Malayan Banking Bhd v Siong Electronic Industries (1981) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CODE NO D4-22-169-1992
ZAKARIA YATIM J
28 JANUARY 1994

Civil Procedure *— Affidavit — Filing and service of affidavit — Amendment to O 32 r 13 of the Rules of the High Court 1980 — Whether amendment has retrospective effect — Rules of the High Court 1980 O 32 r 13*

Statutory Interpretation *— Construction of statutes — Amending legislation — Retrospective effect — Whether amendment procedural or substantive in nature — Interpretation Acts 1948 and 1967 s 30*

This was an application by the plaintiff for an order that summary judgment be entered against the defendants. The application was filed before the amendment to O 32 r 13 of the Rules of the High Court 1980 ('the RHC'). Further affidavits were however filed after the amendment. The question before the court was whether the amendment applied retrospectively. Counsel for the plaintiff contended that the application for summary judgment was filed before the amendment and thus affidavits filed after the amendment were not affected by the amendment. Counsel for the defendants on the other hand submitted that the amendment, being procedural in nature, was not governed by s 30 of the Interpretation Acts 1948 and 1967 ('the Interpretation Act') and had retrospective effect.

Held, ruling in favour of the defendants:

(1) At common law, where an amendment is concerned merely with matters of procedure, it is to be construed retrospectively unless there is a clear indication that such was not the intention of Parliament. However, an amending statute could not be construed retrospectively if it affected any right that existed before the amendment. If the amending statute had the effect of altering a substantive law, or removing a substantive right or depriving a person of a vested right, it should not be construed retrospectively.

(2) In this case, the court was of the opinion that the amendment did not affect any vested right of the plaintiff. The plaintiff's right to prosecute its claim against the defendants was not affected nor was the plaintiff's right to apply for summary judgment against the defendants. The amendment was purely procedural in nature and there was no indication that it was not intended to apply retrospectively.

(3) Section 30(1)(b) and (d) of the Interpretation Act do not apply in the present case. Section 30(1)(b) on its proper construction does not refer to rights of a procedural kind, but only to rights of a substantive kind. Even if s 30(1)(b) and (d) applied to the present

A case, the amendment did not affect any right, privilege or liability acquired or accrued before the amendment. Further, the amendment did not affect the present legal proceedings instituted by the plaintiff because it did not affect any such right of the plaintiff. Therefore, the amendment to O 32 r 13 of the RHC applies retrospectively

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[Bahasa Malaysia summary

Ini adalah satu permohonan oleh plaintif untuk satu perintah bahawa penghakiman terus dimasukkan terhadap defendan. Permohonan itu telah difailkan sebelum pindaan kepada A 32 r 13 Kaedah-Kaedah Mahkamah Tinggi 1980 ('Kaedah-Kaedah itu'). Afidavit lanjut walau bagaimanapun telah difailkan selepas pindaan tersebut. Soalan di hadapan mahkamah adalah sama ada pindaan itu terpakai secara kebelakangan. Peguambela plaintif telah berhujah bahawa permohonan untuk penghakiman terus telah difailkan sebelum pindaan itu dan dengan itu afidavit yang difailkan selepas pindaan itu tidak terjejas oleh pindaan itu. Peguambela untuk defendan sebaliknya menyatakan bahawa pindaan itu, yang bersifat prosedur, tidak dikawal oleh s 30 Akta Tafsiran 1948 dan 1967 ('Akta itu') dan mempunyai kesan kebelakangan.

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Diputuskan, membuat keputusan yang memihak kepada defendan:

(1) Mengikut common law, di mana sesuatu pindaan cuma berkenaan dengan perkara prosedur, ianya harus ditafsirkan secara kebelakangan melainkan terdapat tanda-tanda nyata bahawa itu bukanlah niat Parlimen. Walau bagaimanapun, pindaan tersebut tidak boleh ditafsirkan secara kebelakangan jika ianya menjejaskan sebarang hak yang wujud sebelum pindaan itu. Jikalau statut pindaan itu mempunyai kesan mengubah sesuatu undang-undang substantif, atau mengetepikan sesuatu hak substantif atau melucutkan hak seseorang yang telah terletakhak, ia tidak patut ditafsirkan secara kebelakangan.

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(2) Di dalam kes ini, mahkamah berpendapat bahawa pindaan itu tidak menjejaskan sebarang hak plaintif yang telah terletakhak. Hak plaintif untuk mendakwa tuntutannya terhadap defendan tidak terjejas, mahupun hak plaintif untuk memohon penghakiman terus terhadap defendan. Pindaan itu cuma bersifat prosedur dan tidak ada tanda-tanda bahawa ianya tidak diniatkan terpakai secara kebelakangan.

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(3) Seksyen 30(1)(b) dan (d) Akta itu tidak terpakai di dalam kes ini. Seksyen 30(1)(b), mengikut tafsiran yang sepatutnya, tidak merujuk kepada hak-hak yang berupa prosedur, tetapi cuma merujuk kepada hak-hak yang berupa substantif. Biarpun jika s 30(1)(b) dan (d) terpakai kepada kes ini, pindaan itu tidak menjejaskan sebarang hak, keistimewaan atau tanggungan yang diperolehi atau terakru sebelum pindaan itu. Lagipun, pindaan itu tidak menjejaskan tindakan undang-undang ini yang dimulakan

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oleh plaintif kerana ia tidak menjejaskan sebarang hak plaintif yang sedemikian. Oleh itu, pindaan kepada A 32 k 13 Kaedah-Kaedah itu terpakai secara kebelakangan.]

Cases referred to

1 *Singer v Hasson* (1884) 50 LT 326 (folld)
2 *James Gardner v Edward A Lucas* (1878) 3 App Cas 582 (distd)
3 *Bonning v Dodsley* [1982] 1 WLR 279; [1982] 1 All ER 612 (distd)
4 *Re Athlumney, ex p Wilson* [1898] 2 QB 547 (distd)
5 *Carson v Carson and Stoyek* [1964] 1 WLR 511; [1964] 1 All ER 681 (distd)
6 *Yrttiaho v Public Curator of Queensland* (1971) 125 CLR 228; [1972] ALR 63 (folld)
7 *Wright v Hale* 6 H & N 232; 3 LTNS Rep 444 (folld)
8 *Madden v Madden* [1974] 1 All ER 673; [1974] 1 WLR 247 (distd)
9 *Lee Chow Meng v PP* [1978] 2 MLJ 36 (distd)
10 *PP v Hun Peng Khai & Ors* [1984] 2 MLJ 318 (refd)
11 *PP v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 14 (refd)

Legislation referred to

Interpretation Acts 1948 and 1967 s 30
Rules of the High Court 1980 O 32 r 13
Matrimonial Proceedings and Property Act 1970 s 7(4) [UK]

Blanche O'Leary (*Skrine & Co*) for the plaintiff.
Francis Lim (*Francis Lim & Co*) for the defendant.

Cur Adv Vult

Zakaria Yatim J: This is an application by the plaintiff for an order that summary judgment be entered against the defendants.

At the hearing of the application on 16 September 1993, Miss O'Leary, counsel for the plaintiff, objected to the defendant's affidavit filed on 8 September 1993 (encl 17). She said that it was served on the plaintiff's solicitors only on the afternoon of 15 September 1993. According to her, the plaintiff's fourth affidavit (encl 16) was filed on 8 September 1993.

At this stage, the deputy registrar, Puan Sabariah bte Atan, who was present at the hearing drew my attention to the amendment to O 32 r 13 of the Rules of the High Court 1980. I had a look at the amendment and decided to hear whether encls 16 and 17 were affected by the amendment since the application for summary judgment was filed on 24 April 1992. Both Miss O'Leary and Mr Francis Lim, who was counsel for the defendant, requested for time to do research on the matter.

At the resumed hearing, both counsel were prepared to argue on the amendment vis-a-vis encls 16 and 17. The amendment to O 32 r 13 was made by adding a new sub-rule to the r 13. Sub-rule 2 reads as follows:

A Save as otherwise provided in these rules —

(a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and

(b) a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

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Miss O'Leary said that the application for summary judgment was filed before the amendment was made. She submitted that affidavits filed after the amendment were not affected by the amendment. She referred to s 30 of the Interpretation Acts 1948 and 1967 (consolidated and revised in 1989) ('the Interpretation Act'), and contended that the amendment did not apply retrospectively. She said, 'If Parliament intended it to be retrospective it should state [so] in clear terms.' She submitted a list of authorities for me to consider, namely, *Maxwell on the Interpretation of Statutes* (11th Ed, 1962) at pp 204–205; 44 *Halsbury's Laws of England* (4th Ed) para 925; FAR Bennion, *Statutory Interpretation* (2nd Ed) at pp 218–219; *Singer v Hasson*;[1] *James Gardner v Edward A Lucas*;[2] *Bonning v Dodsley*;[3] *Re Athlumney, ex p Wilson*[4] and *Carson v Carson and Stoyek*.[5] Miss O'Leary said that if the court was of the view that the amendment applied retrospectively, she would ask for leave of the court to abridge time under O 3 r 5.

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E Mr Francis Lim, on the other hand, submitted that the amendment had a retrospective effect. He said that the amendment was procedural in character and therefore it was not governed by s 30 of the Interpretation Act. In support of his submission, he cited a decision of the High Court of Australia in *Yrttiaho v Public Curator of Queensland*.[6] With regard to the question of abridgement of time under O 3 r 5, he said that this would be a matter of separate application.

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I shall first consider the cases cited by Miss O'Leary. The first of case is *Singer v Hasson*.[1] In that case, the plaintiff brought an action for patent infringement before the Patents, Designs and Trade Marks Act 1883 came into force. The defence contended that the patent was not novel and was therefore bad. The plaintiff thereupon applied under s 19 of the new Act for liberty to apply to the patent office for leave to amend his specification by way of disclaimer, by striking out the parts that were not novel. Field J granted the application in chambers. The defendants appealed. Day J said that s 19 was a mere matter of procedure and dismissed the appeal. Smith J was also of the view that s 19 did not deal with anything more than procedure. He applied the rule laid down by Wilde B in *Wright v Hale*.[7] In that case, Wilde B said, 'where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act.' Smith J said that he had read s 19 carefully and he could not find any such contrary expression.

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In my view, *Singer v Hasson*[1] supports Mr Francis Lim's argument and not that of Miss O'Leary's.

The next case cited by Miss O'Leary is *James Gardner v Edward A Lucas*.[2] In that case, the House of Lords decided that ss 38 and 39 of the Conveyancing (Scotland) Act 1874, which dispensed with several requirements essential to the validity of writs in Scotland under previous statutes, were not retrospective and could not remedy the defects in a deed executed before 1874 which was void under the Act of 1696. Lord Blackburn, in his speech at p 603, said that s 39 did not indicate clearly whether it was intended to be retrospective. He then proceeded to construe the Act according to the legal rules of construction. His conclusion was that the prima facie construction of the Act was that it was not to be retrospective. His ground for saying that s 39 was not retrospective was that if it were retrospective, it would have the effect of making that a valid contract which, as the law stood at the time it was executed, was not valid at all.

The next case is *Bonning v Dodsley*.[3] In that case, the court had to consider whether s 7(4) of the Matrimonial Proceedings and Property Act 1970 had a retrospective effect. Section 7(4) of the Act provided:

> If after the grant of a decree dissolving or annulling a marriage either party to that marriage remarries, that party shall not be entitled to apply for an order under section 2 or 4 of this Act against the person to whom he or she was married immediately before the grant of that decree ...

In that case, the parties were married in 1954 and the husband obtained a divorce in 1964. The wife did not apply for financial provision but the parties made an agreement which was to provide income for her and involve rearrangement of their shareholdings in a company formerly belonging to her father. The wife remarried in 1966. The husband sold his interest in the company in 1975 for a large sum. She suffered financial hardship and on 20 January 1981 she served notice to her former husband of her intention to apply for ancillary relief. The husband applied to strike out the application for want of jurisdiction. Sir John Arnold P dismissed the husband's application holding that s 7(4) was not retroactive in its effect. In arriving at his decision, Sir John Arnold P followed the decision in *Madden v Madden*.[8] The husband appealed. The Court of Appeal upheld the decision of Sir John Arnold P. Ormrod LJ, in his judgment at p 283 said that the right course was to apply the principle relied on by Sterling J in *Madden v Madden*.[8]

In *Madden v Madden*,[8] the question before Sterling J was whether s 7(4) of the same Act was intended to have a retroactive effect. The learned judge said that if the section was intended to have a retrospective effect, the result would be that the husband lost a right which he had up to 1 January 1971 whereas the wife acquired rights which hitherto she did not have. The learned judge went on to state that 'there would be a manifest injustice to this husband if the prohibition on his right to vary, which is in my view the *removal of a substantive and not a procedural right*, has to be treated retrospectively ...'. (Emphasis added.)

It is clear that the Court of Appeal in *Bonning v Dodsley*[3] was dealing with the question of substantive right and not a question of procedure when it considered s 7(4) of the Matrimonial Proceedings and Property Act 1970.

The next case is *Ex parte Wilson*.[4] In that case, the question before the court was whether s 23 of the Bankruptcy Act 1890 which came into operation on 1 January 1891 applied retrospectively. Section 23 provided that where a debt, including interest, had been proved on a debtor's estate such interest would for the purposes of dividend be calculated at a rate not exceeding 5%pa, without prejudice to the right of the creditor to receive out of the estate any higher rate of interest to which he might be entitled after all the debts had been paid in full. The facts were that on 31 January 1890, a receiving order was made against the debtor. At the meeting of the creditors, a scheme of arrangement was agreed upon. On 25 June 1890, the scheme was approved by the court and the receiving order was rescinded. One creditor, Mr Morris, tendered his proof which was sworn on 2 April 1890 claiming the sum of £10,153 1s 8d, a large part of the debt was for interest at a rate exceeding 5%pa. The trustee was advised that s 23 was retrospective in operation. Mr Wilson, to whom the debt was assigned by Mr Morris, applied to the court for a declaration that he was entitled, as assignee, to payment of all dividends already declared on the full amount of the claim. The court decided that s 23 was not retrospective in its operation and therefore did not apply to a debt, including interest above 5% proved under a scheme adopted by the court before the date of the passing of the Act. Wright J in his judgment at p 552 stated the rule of construction in the following words:

> ... that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.

At p 553, the learned judge went on to state:

> If the section is construed retrospectively, it will postpone the creditor's right to dividend beyond 5%, and will pro tanto deprive him of the vested right of action which he possessed at the commencement of the Act and when the bankruptcy occurred.

The last case cited by Miss O'Leary is *Carson v Carson and Stoyek*.[5] In that case the court decided that s 3 of the Matrimonial Causes Act 1963 did not apply retrospectively, as that section effected an alteration in substantive law. In his judgment at p 518, Scarman J said:

> It is a section which has effected an alteration in the substantive law. It sees to me to be plain, therefore, that unless Parliament expressly or by clear implication makes such a section retrospective, it will not be retrospective so as to interfere with rights that have accrued prior to the passing of the Act.
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> I think, therefore, that the correct approach in the present case is to see when the conduct occurred which is alleged to have revived the adultery. It is conduct which upon my finding of the facts occurred in the year 1962. That being so, the husband had in my judgment an accrued right to divorce the wife upon the ground of the adultery which he had condoned but which was then revived. Then a year later came the passing of the Act. There is nothing in the language of the section, nothing in the statute read as a whole, which compels me to the view that Parliament, by s 3, intended to interfere with that accrued right.

I shall now consider *Yrttiaho v Public Curator of Queensland*,[6] which was cited by Mr Francis Lim. In that case, the plaintiff commenced an action in the Supreme Court of Queensland against George Copely and Alfred Smith claiming damages for injuries alleged to have been caused by their negligence. On 24 June 1963, the defendants entered appearance. Both defendants died on 20 October 1964 and 13 August 1966, respectively. On 12 February 1966, O 90 r 9 of the Rules of the Supreme Court of Queensland was amended. Before the amendment, the rule provided that if no further action was taken for a period of six years, no fresh proceeding should be taken without the leave of the court. The amendment, however, reduced the period of six years to three years. On 15 August 1967, the plaintiff applied for leave to deliver a statement of claim. Under the amendment, the period of three years had elapsed from the time when the last proceeding in the action was taken. On 13 December 1968, while the application was pending, it was ordered that the Public Curator of Queensland, as the executor and trustee of the wills of the defendants be made a party to the action. On 4 June 1970, leave to deliver a statement of claim was refused by Scarman J. The plaintiff appealed to the Supreme Court of Queensland. His appeal was dismissed. He then appealed to the High Court. The High Court considered s 20(1)(c) and (d) of the Interpretation Acts 1954–1962 of Queensland (which is similar to s 30(1)(b) and (d) of our Interpretation Act) and decided that s 20 did not apply to that case. Gibb J in his judgment at pp 244 and 245 said that s 20(1)(c) did not refer 'to rights of a procedural kind, such as a right to take a fresh step in a pending proceeding'. Menzies J said at p 235, that O 90 r 9 did not affect a 'right, interest, title, power or privilege created, ... established or exercisable' as stated in s 20(1)(c).

With regard to s 20(1)(e), Gibbs J said that it referred to the legal proceeding and remedy themselves, 'and that the section does not reveal an intention to reverse the established rule of the common law that a mere procedural statute is, in the absence of an indication to the contrary to be construed as retrospective'. The court decided that the amendment to O 90 r 9 was purely procedural in nature. The court also held that 'the amendment did not impair the appellant's right or bar his cause of action'.

After considering the cases cited by Miss O'Leary, it appears that all the cases, except *Singer v Hasson*,[1] laid down the following principles.

An amending statute could not be construed retrospectively if it affected any right that existed before the amendment. A statute could not be construed retrospectively if it had the effect of making a contract valid which, as the law stood at the time it was executed, was not valid. If the amending statute had the effect of altering a substantive law or removing a substantive right, it should not be construed retrospectively.

The Federal Court in *Lee Chow Meng v PP*[9] applied the same principles as stated above and decided that an amendment to the Courts of Judicature Act 1964 which gave a person a right of appeal to the Federal Court when such right did not exist before the amendment, must not be construed retrospectively. In delivering the judgment of the court, Suffian LP said at p 37:

A Here at the time of the appellant's conviction he had no right of appeal from the appellate High Court to the Federal Court, so there is no question of the amendment to the Courts of Judicature Act interfering with his right of appeal then existing. The amendment confers a right of further appeal to the Federal Court on a person convicted by a Special President. This amendment deals not with a mere matter of procedure, but confers a substantive right. Prima facie it B has prospective effect only unless there is a clear indication to the contrary. In our judgment there is no such indication here. It follows therefore that a person convicted by a Special President before the amendment who has lost an appeal to the High Court has no right of further appeal to this court.

The case cited by Mr Francis Lim is in respect of an amendment to the C Rules of the Supreme Court of Queensland. The court held that the amendment, which was purely procedural and did not affect the right of the plaintiff to prosecute his claim must be construed retrospectively.

It is now necessary to consider s 30 of the Interpretation Act. The section states:

D (1) The repeal of a written law in whole or in part shall not —

(a) affect the previous operation of the repealed law or anything duly done or suffered thereunder; or

(b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law; or

(c) affect any penalty, forfeiture or punishment incurred in respect of any E offence committed under the repealed law; or

(d) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may F be imposed, as if the repealing law had not been made.

As stated earlier, s 20(1)(c) and (e) of the Interpretation Acts of Queensland is similar to our s 30(1)(b) and (d). In *Yrttiaho v Public Curator of Queensland*,[6] Gibbs J said at p 245:

However, in my opinion, the appellant had no right within s 20(1)(c) because G that paragraph on its proper construction does not refer to rights of a procedural kind, such as a right to take a fresh step in a pending proceeding. I do not, of course, deny that the expression 'right', standing alone, would include a right belonging to the area of procedure. However, legal proceedings and remedies are dealt with in s 20(1) by para (e) and by the words which follow it, which provide that prima facie an amendment shall not affect any investigation, legal proceeding H or remedy in respect of an accrued right and which go on to provide for the institution, continuance or enforcement of any such investigation, legal proceeding or remedy as if the amending Act had not been passed. The express mention in these provisions of legal proceedings and remedies, and the contrast with the earlier paragraph which relates to rights, make it clear to my mind that para (c) is not concerned with matters of procedure, but only with rights of a substantive I kind.

The learned judge then held that s 20(1)(c) and (e) did not apply to that case.

It will be noted that our s 30 uses the words 'repeal of a written law'. Under s 3 of the Act, the word 'repeal' is defined to include rescind, revoke, cancel, and replace. It has been decided by the High Court in Penang that the word 'amends' includes 'repeals'. See *PP v Hun Peng Khai & Ors*[10] at p 294. Section 3 of the Interpretation Act defines 'written law' to include subsidiary legislation. And 'subsidiary legislation' means any proclamation, rule, regulation, order, made under an Act of Parliament. The amendment to O 32 was made by the Rules Committee under s 17 of the Courts of Judicature Act 1964 with the consent of the Chief Justices of Malaya and Borneo. It follows that the amendment falls within the definition of 'the repeal of a written law' in s 30(1).

If the reasoning in *Yrttiaho v Public Curator of Queensland*,[6] is followed, s 30(1)(b) and (d) does not apply to the present case. The court will then have to apply the common law principle.

According to 44 *Halsbury's Laws of England* (4th Ed) at p 574, where an amendment is concerned merely with matters of procedure it is to be construed as retrospective unless there is a clear indication that such was not the intention of Parliament. However such amendment does not apply retrospectively if the effect is to deprive a person of a vested right such as the right of a plaintiff to continue an action. See also *PP v Datuk Haji Harun bin Haji Idris*.[11]

In my opinion, the court may rely on the decision in *Yrttiaho v Public Curator of Queensland*.[6]

Miss O'Leary submitted that if the amendment applied retrospectively, the plaintiff could not proceed fully with its O 14 application. She said that the amendment violated the vested right of the plaintiff.

In the present case, the application for summary judgment was filed on 24 April 1992. The application is supported by an affidavit filed on the same day. The plaintiff filed a second affidavit on 7 September 1992, and a third affidavit on 13 November 1992. The plaintiff then filed the fourth affidavit (encl 16) on 8 September 1993, that is, about 10 months after the third affidavit was filed and about five weeks after the amendment came into force. Enclosure 17 was filed by the defendants on 15 September 1993.

In my opinion, the amendment does not affect any vested right of the plaintiff. The plaintiff's right to prosecute its claim against the defendants for the amount stated in the statement of claim is not affected. The plaintiff's right to apply for summary judgment against the defendants is also not affected. The amendment is purely procedural in nature and there is no indication that it is not intended to apply retrospectively. The cases cited by Miss O'Leary, except *Singer v Hasson*,[1] do not therefore apply to the present case.

If I am wrong in relying on the decision in *Yrttiaho v Public Curator of Queensland*,[6] and assuming that s 30(1)(b) and (d) apply to the present case, the question to be considered is: (i) whether the amendment affects any right, privilege or liability acquired or accrued before the amendment; or (ii) whether the amendment affects a legal proceeding or remedy in respect of such right, etc. In my opinion, in the present case the amendment does not affect any right, privilege or liability acquired or accrued before the

A amendment. Further, the amendment does not affect the present legal proceedings instituted by the plaintiff because it does not affect any such right of the plaintiff.

Since the right of the plaintiff in respect of the present proceedings is not affected by the amendment under s 30(1), such proceeding cannot continue as if the amendment had not been made. In the circumstances, the court B has to fall back on the common law principle as stated earlier.

On the question of abridgement of time under O 3 r 5, any party may file an application for the court to consider.

For the reasons stated above, I rule that the amendment to O 32 r 13 of the Rules of the High Court 1980 applies retrospectively. Enclosures (16) C and (17) cannot therefore be considered for the purpose of the present application.

Order accordingly.

Reported by Kevin Ooi

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